Supreme Court, U.S.
FILED
MAR 4 1991
OFFICE OF THE CLERK

No. 90-1235

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JET CHARTER SERVICE, INC.,

Petitioner,

—vs.—

BANQUE PARIBAS (SUISSE), S.A.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

DAVID S. PATTERSON
BREED, ABBOTT & MORGAN
153 East 53rd Street
New York, New York 10022
(212) 888-0800

Counsel of Record for Respondent

Of Counsel:

DAVID S. PATTERSON
JILL I. BRAVERMAN
BREED, ABBOTT & MORGAN
153 East 53rd Street
New York, New York 10022
(212) 888-0800

BEST AVAILABLE COPY

COUNTERSTATEMENT OF QUESTION PRESENTED

Should this Court review the unanimous holding of the Court of Appeals that the due process clause of the Fourteenth Amendment bars the assertion of in personam jurisdiction over a Swiss bank based solely upon its representative's presence at the Florida closing of a purchase by the bank's Swiss customer who had borrowed the purchase price from the bank in Switzerland and arranged there for the bank to issue a letter of credit?

TABLE OF CONTENTS

	Page
COUNTERSTATEMENT OF QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
COUNTERSTATEMENT OF THE CASE	1
The Opinions Below	4
REASONS FOR DENYING THE PETITION	5
I. Introduction	5
II. The Ruling of the Court of Appeals Comports with the Decisions of This Court Governing In Personam Jurisdiction Over a Nonresident Defendant	6
III. The Bank's Issuance of a Letter of Credit in Switzerland Does Not Subject It to In Personam Jurisdiction of Florida Courts	9
CONCLUSION	12

TABLE OF AUTHORITIES

Cases **Page**

Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102 (1987) 8

Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985).....4, 5, 6, 7, 8, 9

Chandler v. Barclays Bank PLC, 898 F.2d 1148 (6th Cir. 1990) 10, 11

Empire Abrasive Equipment Corp. v. H.H. Watson, Inc., 567 F.2d 554 (3d Cir. 1977)..... 10

Hanson v. Denckla, 357 U.S. 235 (1958) 7, 8

Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984) 7

International Shoe Co. v. Washington, 326 U.S. 310 (1945) 7, 8

Leney v. Plum Grove Bank, 670 F.2d 878 (10th Cir. 1981).....10, 11

Pacific Reliant Industries v. Amerika Samoa Bank, 901 F.2d 735 (9th Cir. 1990).....10, 11

Van Schaack & Co. v. District Court, 189 Colo. 145, 538 P.2d 425 (1975) 10

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) 7, 8

Other Authorities

S. Ct. R. 10.1(c) 5

U.C.C. § 5-103 (1978) 9, 9n.5

J. White & R. Summers, *Uniform Commercial Code* § 19-2 (3d ed. 1988) 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1235

JET CHARTER SERVICE, INC.,

Petitioner,

—VS.—

BANQUE PARIBAS (SUISSE), S.A.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

This case involves a purely contractual dispute arising out of the November 1985 sale of two aircraft by Petitioner Jet Charter Service, Inc. ("Seller"), a Florida corporation, to a Swiss corporation, Progress Aviation, S.A. ("Buyer"), for $26,473,500. In the fall of 1985, Respondent Banque Paribas (Suisse), S.A. ("Bank"), a banking organization organized under the laws of Switzerland, with headquarters in Geneva, Switzerland, had agreed in Switzerland with Buyer, its Swiss customer, to lend Buyer $24,500,000 to finance Buyer's purchase of the aircraft. The Bank is not involved in the aircraft

business, did not participate in the negotiations between Buyer and Seller and is not a party to the purchase agreement.[1]

The aircraft purchase closing was held in Florida. The sole contact the Bank had with Florida was, because of the large sums involved the Bank sent Jean Caillet, the loan officer who had worked on the loan, to observe the closing. Caillet lives and works in Geneva, Switzerland and is a citizen of France. Caillet traveled to Florida to attend the closing, spent two nights there and has not returned since. Although Caillet attended the closing, neither Caillet nor the Bank received anything from the Seller and no pecuniary benefit of any kind. Late in the day of the closing, the parties focused upon Buyer's obligation to provide a letter of credit. While any bank could have issued such a letter, the parties asked Caillet if the Bank would issue a letter of credit. Caillet affirmed in a letter that consistent with the terms of the purchase agreement, the Bank would issue such a letter of credit on behalf of Buyer.[2]

---

1 Until 1987 a majority of the outstanding shares of the Bank was indirectly owned by the Government of France through its holding company, Compagnie Financière de Paribas ("CFP"). At present, more than 99% of the shares are indirectly owned by CFP, which is now publicly held, and less than 1% are owned by the public. This statement is made pursuant to Rule 28.1 of the Rules of this Court.

2 "Pet." denotes reference to the Petition for Writ of Certiorari. "App." denotes reference to the Appendix to the Petition for Writ of Certiorari. While petitioner's brief purports to set forth pertinent facts relating to the closing (Pet. 3) by way of excerpts from the Court of Appeals opinion reported at 907 F.2d 1110 (11th Cir. 1990), petitioner omits a significant paragraph bearing on the jurisdictional issue. In describing the letter of credit at issue as "payable upon presentation to 'Banque Paribas in Miami, Florida' ", petitioner omits footnote 1, thereby incorrectly suggesting that the Bank has a branch office in Florida. (App. 3) Footnote 1 specifically clarifies that the "Banque Paribas" referenced in the letter of credit is *not* a branch, subsidiary or affiliate of the Bank, but is instead a branch office of a French bank governed by different officers and directors. The actual letter of credit

Following the closing, Buyer arranged at the Bank's Geneva office for the Bank to open a letter of credit from Geneva with terms as specified by Buyer. Seller immediately rejected the letter as not complying with Buyer's obligations under the purchase agreement. Seller never attempted to draw on the letter and it expired on March 31, 1986 by its own terms.

Instead of pursuing a straightforward contract action against Buyer, Seller opted to try and hold Buyer's Bank liable for Buyer's alleged breach of contract—under the purchase agreement to which the Bank was not a party—and for Buyer's failure to provide a letter of credit containing the terms called for in the purchase agreement.[3] The complaint, which petitioner has omitted from the Appendix, but is summarized in the opinion of the Court of Appeals (App. 4), attempts to assert in personam jurisdiction over the Bank under the Florida long-arm statute, Fla. Stat. § 48.193, by virtue of the Bank's alleged contacts with the Florida closing and the letter of credit.

The Bank moved to dismiss the complaint on the ground that as a Swiss bank not licensed to do business in Florida and not having any office, employee or property in Florida, the mere physical presence of the Bank's representative in Florida to observe a closing to which the Bank was not a party did not amount to sufficient contacts to support personal jurisdiction under the Florida long-arm statute or consistent with due process.

---

arranged was also of no jurisdictional significance because it was arranged by Buyer with the Bank entirely in Switzerland and never became effective because it expired after it was immediately rejected by Seller.

3 As noted by the Court of Appeals (App. 4-5 & n.2), during the two years preceding the appeal, the District Court had dismissed the five-count complaint against all originally named defendants including Buyer, Caillet and the Bank, and thus, the issue of Buyer's alleged breach of contract was never decided by the District Court. (App. 5)

The Opinions Below

The District Court dismissed the complaint against the Bank, holding that insufficient facts were alleged "to support in personam jurisdiction under Florida's long arm statute." (App. 17) The District Court specifically stated (*id.*) that while

> [c]ount [f]our of the complaint alleges that the Bank breached an agreement to provide a letter of credit; however, neither the complaint nor the affidavit in opposition to the motion to dismiss supports the contention that the Bank was engaged in service activities within the State of Florida, as required by § 48.193(f), or that the alleged contract required the Bank to perform acts within Florida, as required by § 48.193(1)(g). Therefore, the Bank shall be DISMISSED as a defendant.[4]

The Court of Appeals affirmed, unanimously holding that under the tests set forth in *Burger King Corporation v. Rudzewicz*, 471 U.S. 462 (1985), which addressed the constitutional limits of the identical Florida long-arm statute, "the circumstances of the present case are insufficient under the Fourteenth Amendment to establish personal jurisdiction of the Florida courts over defendant [Bank]." (App. 8)

The Court of Appeals analyzed the Bank's Florida contacts as "brief, non-essential contact with Florida soil, coupled with its involvement in a sales transaction initiated by a third-party, a Swiss company . . . ." The court added that "the fact that Caillet attended the closing [even] assuming one of the purposes for being there was to deliver the letter of credit [for its customer, Buyer] is irrelevant for purposes of establishing personal jurisdiction." (App. 8-9 & n.4) Ultimately, the Court of Appeals found that these contacts failed to meet

---

4 The order of the District Court as set out in the Appendix to the Petition is inaccurate in that it omits some of this excerpt.

the test of " 'minimum contacts' with the forum state to satisfy the requirements of due process" so as "to indicate to [the Bank] that it should expect to be haled into Florida's courts over disputes that arise out of the sale transaction." (App. 6, 9)

REASONS FOR DENYING THE PETITION

I.

Introduction

This case presents neither special nor important reasons to grant review. The ruling below simply applies the constitutional limits of the doctrine of in personam jurisdiction as established by this Court in *Burger King Corporation v. Rudzewicz*, 471 U.S. 462 (1985), in the particular context of the identical Florida long-arm statute considered in that case, and denies the assertion of in personam jurisdiction over a foreign bank which has virtually no contacts with Florida.

In light of *Burger King*, it is clear that the Court of Appeals decision is not, as the petition seeks to establish, in conflict with an applicable decision of this Court. At best, the decision presents only a factual dispute but certainly no "important question of federal law which has not been, but should be, settled by this Court . . . ." (S. Ct. R. 10.1(c)) Nor is there a conflict in the circuits on this issue. This record thus gives rise to no issue of law worthy of review by this Court.

II.

The Ruling of the Court of Appeals Comports with the Decisions of This Court Governing In Personam Jurisdiction Over a Nonresident Defendant

Petitioner urges that in determining that the Florida long-arm statute did not permit the exercise of in personam jurisdiction over the Swiss Bank for its alleged breach of contract in Florida, the Court of Appeals applied an incorrect "constitutional test" (Pet. 6) which required a " 'long term contractual commitment [by the Bank] to the Florida Seller.' " (Pet. 7) (citation omitted.) Yet, the Court of Appeals analyzed the jurisdiction issue presented under the most directly analogous decision of this Court, *Burger King Corporation v. Rudzewicz*, 471 U.S. 462 (1985), applying the identical provision of the Florida long-arm statute at issue here to exercise jurisdiction over a nonresident defendant for his alleged breach of contract in Florida.

In *Burger King*, this Court approved the exercise of in personam jurisdiction based upon the existence of "prior negotiations and contemplated future consequences, along with the terms of the [franchise agreement between plaintiff and defendant] and the parties' actual course of dealing." 471 U.S. at 479. In contrast here, as the Court of Appeals emphasized, the "circumstances [are] qualitatively different from those presented in Burger King." (App. 7) The qualitative difference was not, as petitioner argues, the *length* of contractual commitment but the *existence* of contractual commitment between Seller and the Bank strikingly lacking at bar. Simply put, the Bank was not a party to prior negotiations or the final purchase agreement between Buyer and Seller. The Bank's only contractual obligation connected to the aircraft purchase ran to the Swiss Buyer. The Bank had no contractual agreement with Seller to deliver the letter of credit at closing that could serve as a predicate for in personam jurisdiction. Even Caillet's visit to Florida was a "non-essential contact with Florida soil" for jurisdiction purposes because the Bank could have opened the letter of credit

(and eventually did open the letter of credit) and confirmed such opening from Geneva. (App. 8-9 & n.4)

Nevertheless, under *any* of the constitutional tests set forth in decisions of this Court, the exercise of in personam jurisdiction over the Swiss Bank based upon its isolated and insignificant contacts with the State of Florida would fail to meet the requirements of due process.

The due process clause of the Fourteenth Amendment restricts the power of a state to assert in personam jurisdiction over a nonresident defendant. *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 413-14 (1984). First, due process requires that the defendant have "certain minimum contacts" with the forum state so that maintaining an action does not "offend 'traditional notions of fair play and substantial justice.' " *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). This Court has held that the minimum contacts requirement is met where the defendant "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

Due process further requires that "the relationship between the defendant and the forum must be such that it is 'reasonable . . . to require the [non-resident] corporation to defend the particular suit which is brought there.' " *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980) (quoting *International Shoe*, 326 U.S. at 317). This Court has stated that "[j]urisdiction is proper . . . where the contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State." *Burger King*, 471 U.S. at 475 (emphasis in original) (quoting *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223 (1975)). On the other hand, random, fortuitous or attenuated contacts or contacts produced by the unilateral activity of a third person do not serve to "reasonably" warn the defendant that he may be subject to the exercise of in personam

jurisdiction in the forum state. *See id.* at 475 (citations omitted.) In determining the reasonableness of asserting jurisdiction over a foreign defendant, courts also may weigh other factors including "the burden on the defendant, the interests of the forum State [in adjudicating the dispute], and the plaintiff's interest in obtaining relief." *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 113 (1987); *see also World-Wide Volkswagen*, 444 U.S. at 292.

As recognized by the Court of Appeals in this case (App. 7-10), forcing the Bank to defend itself in a Florida action would "offend 'traditional notions of fair play and substantial justice.' " *International Shoe*, 326 U.S. at 316 (citation omitted). Neither the Bank's loan to the Swiss Buyer, nor its opening of a letter of credit on Buyer's instructions in Switzerland, demonstrated a sufficiently "substantial connection" with the State of Florida to serve as a basis for asserting in personam jurisdiction over the Bank. *See Burger King*, 471 U.S. at 475. Equally clearly, in sending an employee to Florida to observe its Swiss customer's use of the loan proceeds, the Bank was not purposefully availing itself of the benefits and protections of Florida's laws. *See Hanson*, 357 U.S. at 253. Nor could the Bank reasonably have anticipated that voluntarily sending a representative to observe a closing in Florida to which the Bank was not a party would subject the Bank to suit in Florida. *See World-Wide Volkswagen*, 444 U.S. at 292. Moreover, having no presence at all in Florida, it would be a very real burden to the Swiss Bank to defend itself in a distant forum. *See Asahi*, 480 U.S. at 113.

III.

The Bank's Issuance of a Letter of Credit in Switzerland Does Not Subject It to In Personam Jurisdiction of Florida Courts

Petitioner also appears to argue (Pet. 7-8) that the Swiss Bank's issuance of a letter of credit in favor of the Florida Seller payable in Florida constitutes sufficient "minimum contacts" with Florida to permit the exercise of in personam jurisdiction over the Bank, as did the contractual relationship between the parties in *Burger King*.[5] However, a letter of credit is not a formal contract between the issuing bank and the beneficiary—in this case, Seller.[6] Under the Uniform Commercial Code, a letter of credit is defined as a written "engagement" by an "issuer" with a "customer" to honor demands for payment by a "beneficiary" which comply with the terms of the credit. U.C.C. § 5-103 (1978); *see generally* J. White & R. Summers, *Uniform Commercial Code* § 19-2, at 7 (3d ed. 1988) ("there has been a tendency to analogize the letter of credit to other legal arrangements, and this has

---

5 While petitioner also implies that the Bank's alleged "promise" at the Florida closing to issue a letter of credit somehow subjects the Swiss Bank to the in personam jurisdiction of a Florida court, this argument is completely specious. As the Court of Appeals found, the November 21 letter of assurance (Pet. 4) drafted at the Florida closing was not a contract between Seller and the Bank. (App. 9-10 & n.4) The Bank never received any consideration from Seller or pecuniary benefit of any kind. The November 21 letter was vague and lacked material terms—for example, it purported to incorporate by reference all of the "terms and conditions" of the aircraft purchase agreement to which the Bank was not even a party. Finally, it is a legal impossibility for the Bank as the issuer and the Seller as the beneficiary to contract for the opening of a letter of credit, which only can be done at the instruction and on terms provided by the Bank's customer—in this case, Buyer. *See* U.C.C. § 5-103 (1978).

6 The only contracts the Bank was party to were the two agreements with its Swiss customer, Buyer—one to lend it $24.5 million and the other to open on its behalf a letter of credit. Both agreements were negotiated and entered into in Switzerland and neither was breached by the Bank in Florida.

led to error"). Here, the letter of credit was arranged by and between the Swiss Bank and its Swiss customer and issued from Switzerland in favor of the Florida Seller. No contractual relationship exists between the Bank and Seller.

And, there is absolutely no conflict in the circuits that the "mere issuance of a letter of credit naming a resident of a particular state as a beneficiary does not subject the issuing bank to the jurisdiction of that state." *Chandler v. Barclays Bank PLC*, 898 F.2d 1148, 1151 (6th Cir. 1990); *accord Pacific Reliant Indus. v. Amerika Samoa Bank*, 901 F.2d 735 (9th Cir. 1990); *Empire Abrasive Equip. Corp. v. H.H. Watson, Inc.*, 567 F.2d 554, 558 (3d Cir. 1977).

Petitioner erroneously relies on *Van Schaack & Co. v. District Court*, 189 Colo. 145, 538 P.2d 425 (1975), a Colorado Supreme Court decision which upheld in personam jurisdiction over a Kansas bank which had issued and later revoked a letter of credit to a Colorado beneficiary, in part because the beneficiary had relied on the letter in extending the underlying sales contract bearing a "substantial connection" to Colorado real estate. But as the Court of Appeals found, this due process analysis was subsequently discredited by the Tenth Circuit in *Leney v. Plum Grove Bank*, 670 F.2d 878, 881 (10th Cir. 1981), based upon the Colorado court's failure to recognize that " '[t]he bank's obligation under the letter of credit is independent of the underlying sales contract.' " (citation omitted.) In *Leney*, the Tenth Circuit held that asserting personal jurisdiction over an Illinois bank violated due process when "[o]ther than mailing the letter of credit to a Colorado attorney, the Bank's only connection to Colorado was its probable knowledge that the letter was going to be used in the sale of Colorado property to a Colorado corporation." *Id.* at 880.

Petitioner contends that *Leney* is inapposite because in *Leney* "unlike this proceeding, there was no commitment made by the bank to do anything in the forum state." (Pet. 8) But here, the letter of credit was negotiated by the Bank and the Swiss Buyer in Switzerland and issued from Switzer-

land, not Florida. The Bank did not take any significant actions in Florida. Even the November 21 letter of assurance drafted at the closing only affirmed the issuance of a letter of credit from Switzerland. Petitioner's failure to point to any commitment by the Swiss Bank to engage in any purposeful activities in Florida only strengthens the Court of Appeals' reliance on *Leney* as controlling authority.

Chandler v. Barclays Bank PLC, 898 F.2d 1148 (6th Cir. 1990), decided under factual circumstances strikingly similar to this case, provides further support for the Court of Appeals' holding that the Swiss Bank's issuance of a letter of credit in Switzerland did not subject it to the exercise of in personam jurisdiction by a Florida court. In *Chandler*, the Sixth Circuit held that where an Egyptian bank issued a letter of credit in Egypt to a Michigan beneficiary on behalf of its customer, an Egyptian corporation, but the bank had no contacts with nor presence in Michigan, it would violate due process to subject the bank to the in personam jurisdiction of the Michigan courts under the Michigan long-arm statute in connection with a dispute arising out of the underlying sales transaction. *See also Pacific Reliant Indus. v. Amerika Samoa Bank*, 901 F.2d 735, 738 (9th Cir. 1990) (American Samoan bank's conduct in issuing letter of credit in favor of Oregon beneficiary did not subject it to suit in Oregon).

Accordingly, because the Swiss Bank did not invoke the benefits and protections of Florida's laws, nor could it reasonably anticipate being haled into court in Florida based upon its issuance of a letter of credit in Switzerland on behalf of its Swiss customer to a Florida beneficiary, due process does not permit the exercise of in personam jurisdiction over the Bank.

CONCLUSION

It is respectfully submitted that the petition for writ of certiorari does not meet any of this Court's criteria for exercising its discretion to grant certiorari; that the Court of Appeals decision is correct in all respects; and that the petition should be denied.

Respectfully submitted,

David S. Patterson
Counsel of Record

Jill I. Braverman
BREED, ABBOTT & MORGAN
153 East 53rd Street
New York, New York 10022
(212) 888-0800

Counsel for Respondent
Banque Paribas (Suisse), S.A.

March 4, 1991